MOTION FILED

MAR 30 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF PUBLIC AFFAIRS ASSOCIATES, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Public Affairs Associates, Inc., hereby moves for leave to file the attached brief as *amicus curiae.*

Public Affairs Associates is an educational publishing corporation which specializes in publications related to current events, including publications based on government prepared materials. Amicus was the plaintiff in *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), which is relied on by counsel for the parties in this action.

The annexed brief is intended by *amicus* to provide the Court with additional material on the question which underlies this appeal but which has not been adequately briefed by the parties—who *owns* the papers, documents

and other records generated within or received by the office of the President. That issue was the subject of a detailed and well reasoned opinion by the District Court at an earlier stage of this litigation, *Nixon* v. *Sampson,* 389 F.Supp. 107 (D.D.C. 1975), which concluded that the records, etc., at issue in this case were and always had been the property of the United States. Notwithstanding Rules 15(1)(a) and (h) and 40(1)(a), appellants did not mention the existence of this opinion in either their Jurisdictional Statement* or Brief, or reproduce it in their Jurisdictional Statement. The government's brief refers to the existence of "an opinion" at 389 F.Supp. 107, but does not discuss its nature or relevance. Brief for the Federal Appellees, p. 10.

Appellant asserts that he owns some 42,000,000 documents and tapes, and that he therefore should be free to destroy, alter, or sell them on the open market. Although Judge Richey, below, concluded that these materials belonged to the United States, the Solicitor has declined to assert that the government owns the records or to discuss the matter at all. We do not contend that the Solicitor General's silence on this issue is in any way improper. On the contrary, we note that the Department of Justice also declined an express invitation to take a position as to whether the government owned the materials at issue in *Public Affairs Associates* v. *Rickover*, 369 U.S. 111, 113 (1962).

A decision that the disputed records are the property of the United States will, for the reasons set out in our brief, be dispositive of the issues presented by this appeal. If this appeal is affirmed on the more complex grounds

* The Jurisdictional Statement noted that the original agreement between appellant and the Administrator was reproduced at 389 F. Supp. at 160-62. P. 6, n. 2.

suggested by the Solicitor General, it will be but a prelude to a new round of litigation between Mr. Nixon and the General Services Administration regarding assertions of privilege and claims for monetary compensation; a decision on the question of ownership will pretermit most such litigation and issues. More importantly, such a decision will bring to an end the surreptitious conversion of government property by public officials at all levels. Although the practices of outgoing Presidents and other federal employees has varied widely over the years, permanent employees of the executive branch have been uniformly unwilling to protect the government files from such pillage. In most cases the permanent employees aware of the proposed removal of federal documents are subordinates of the officials taking the materials, and are naturally reluctant, as are colleagues who may wish to engage in similar practices, to assert that the materials are government property. Private parties not unwilling to make such an assertion may lack the requisite standing. This is one of the few circumstances in which the question of ownership of presidential and other official papers is squarely presented, and it should now be decided.

We are not insensitive to the fact that a decision on ownership will, to some extent, touch on the practices of past and present members of this Court. Were there other circumstances in which the issue could be decided without that complication, it might be wise to defer decision until such a case arose, but any case presenting the issue of ownership will have simliar ramifications. There is no alternative judicial forum in which this difficulty will not exist. Compare *Laird* v. *Tatum,* 409 U.S. 824, 837-38 (1972) (Rehnquist, *J.*).

This Court has in recent years adopted a salutary practice of requiring that a motion for leave to file a brief

was $200,000 a year. 3 U.S.C. § 102. The Emolument Clause would clearly be violated if a President were permitted to augment his statutory salary by seizing title to any number of "presidential documents", whose creation, assemblage, number and dollar value were largely controlled by the President himself.

The conduct of past Presidents does not, we believe, support appellant's claim of ownership. Past Presidents have frequently insisted publicly that officially generated papers were government property. In 1782 Reverend William Gordon, then at work on a history of the nation's origin, wrote to General Washington seeking access to the latter's Revolutionary War records. Washington declined to make the records available on the ground that they were public property and only Congress could open them for private use.

> "[T]he Papers of the Commander-in-Chief . . . I consider as a species of Public property, sacred in my hands . . . . When Congress then shall open their registers, and say it is proper for the Servants of the public to do so, it will give me much pleasure to afford all the Aid to your labors and laudable undertaking which my papers can give; 'til one of those periods arrive I do not think myself justified in suffering an inspection of, and any extracts to be taken from my Records." [3]

President Roosevelt in 1941 described the White House papers as "the people's record" and announced that they would be placed, on the completion of his presidency, in

[3] J.C. Fitzpatrick, The Writings of George Washington from The Original Manuscript Sources, v.25, pp. 288-89 (1931-40). In 1783 Washington again wrote Gordon assuring him that "All my Records and Papers shall be unfolded" when "the Sovereign Power" authorizes it. Id., v. 27, p. 52.

a government authorized library in Hyde Park.[3] Roosevelt's written instructions contemplated that the library and its contents would become part of the National Archives, which is what occurred. In 1947 the *Christian Science Monitor* described the views of President Truman on this subject:

> President Truman plans to set a precedent for Presidents. He will not, repeat not, take with him his state papers when he leaves the White House. . . . The President feels strongly about this; he has for a long time. The public papers of any top official, from the President on down, should remain the property of the government, he holds.[4]

On September 16, 1974, President Ford announced a similar position regarding the papers of his presidency:

> As far as I am personally concerned, I can see a legitimate reason for Presidential papers remaining the property of the government. . . . In my own case, I made a decision some years ago to turn over all of my Congressional papers, all of my Vice Presidential papers to the University of Michigan archives. As far as I am concerned, whether they go to the archives for use or whether they stay in the possession of the government, I don't think it makes too much difference. I have no desire personally to retain whatever papers come out of my administration." [5]

[3] The Public Papers and Addresses of Franklin D. Roosevelt, p. 630 (1941); H.G. Jones, The Records of a Nation, 157, 162 n. 25 (1969).

[4] January 29, 1947.

[5] Weekly Compilation of Presidential Documents, September 23, 1974, p. 1160.

The actions of past Presidents are more varied, and their precedential significance obscured by the lack of records of what occurred and why, and by the absence of an officially designated depository for the systematic retention and preservation of presidential documents. After leaving the Presidency, for example, George Washington wrote to the Secretary of the Treasury about the need of facilities "for the security of my Papers of a public nature" and engaged in correspondence with the Secretary of War regarding suitable "accommodation and security of my Military, Civil and private Papers". Since provisions for official storage were never made, and Washington had no choice but to leave them in the custody of his heirs.[6] President Jefferson "deposited in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of public business or being in any sense official in nature",[7] but owing to the informal practices of the era many of these documents were later acquired by private collectors. Thereafter, in the continuing absence of any specifically designated depository, some Presidents left official documents in the possession of whichever department they thought most likely to preserve them,[8] while others took with them some documents the number and nature of which is not known. Beginning about 1905, when the Library of Congress intensified its interest in assembling and preserving presidential papers, large numbers of such documents were deposited with the Library by former Presidents Theodore Roosevelt, Taft and Coolidge and the heirs of Presidents

[6] J.C. Fitzpatrick, The Writings of George Washington from the Original Manuscript Sources, v. 27, p. 155, v. 32, pp. 15, 41, v. 35, pp. 430-31 (1931-40).

[7] *Nixon* v. *Sampson*, 389 F.Supp. 107, 141 (D.D.C. 1975).

[8] See Exhibit AA, p. v; Exhibit BB, p. vii.

Van Buren, William Henry Harrison, Polk, Lincoln, Grant, Garfield, Cleveland, Benjamin Harrison, McKinley, and Wilson.[9] Since the adoption of the National Archives Act in 1934 every former President has placed such records as he removed from the White House in an officially designated library maintained by the National Archives and Records Service. These varying practices suggest, not a uniform assumption that a former President owned whatever materials he could physically remove from the White House, but differing efforts to find suitable depositories for documents recognized to be public in nature.

Even if the record revealed a pattern of Presidents acting as if they owned such papers, selling or copyrighting them for financial gain, that would not constitute the sort of practice deserving of precedential significance, for the instances of such conduct have been essentially surreptitious in nature. The public was not in the past aware whether, and even now the parties are in dispute as to the extent to which, former Presidents have been treating officially generated papers as their private property. The practice of some public officials of donating public papers back to the government, or to other institutions, in return for a tax deduction caused a public scandal of major proportion when it was first exposed in 1969 by the *Wall Street Journal*.[10] Both the Library of Congress, the recipient of these "donations", and over a dozen alleged donors refused to disclose whether or which federal officials had engaged in such a practice. Appellant never publicly disclosed that he had used his Vice-Presidential papers in this manner, and the country only learned of it through a story in the *Providence Journal* on October 3, 1973. The Treasury De-

[9] Hearing on Presidential Libraries by a Special Subcommittee of the House Committee on Government Operations, 84th Cong., 1st Ses., pp. 39-44 (1955).

[10] May 22, 1969; 115 Cong. Rec. 20462-63 (1969).

partment employee responsible for that disclosure was dismissed; the use of those papers to pay virtually no income taxes in 1970 and 1971 was a subject of the subsequent House impeachment inquiry, led to criminal convictions of an appraiser and attorney involved, was subsequently disapproved as inconsistent with the Internal Revenue Code by the Treasury Department. Practices of the sort which have survived only when hidden from the scrutiny of public opinion are not the "deeply embedded traditional ways of conducting government" to be relied on in construing the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 611 (1952).

As Judge Richey noted below, *Folsom* v. *Marsh*, 9 Fed. Cas. No. 4,901 (C.C.D. Mass. 1841), expressly noted that any rights of a former President to papers prepared or received by him were subservient to the rights and interests of the government, and *Folsom* thus supports the constitutionality of the Presidential Recordings and Materials Preservation Act. 389 F.Supp. at 139-140. Insofar as Justice Story's opinion in *Folsom* concludes that a former President has a fungible property right, as against other individuals, in such papers, we believe Justice Story's personal interest and involvement in the publication at issue in *Folsom* was so substantial as to vitiate any precedential significance of that decision.

Folsom concerned the validity of a copyright of a multivolume collection of George Washington's presidential and other papers, edited by Jared Sparks and published by Charles Folsom. In 1826 Sparks approached Justice Bushrod Washington, the former President's nephew who was in possession of many of the latter's letters, etc., and sought his cooperation in assembling the proposed collection. In soliciting Justice Washington's cooperation, Sparks turned for aid to Justice Story, whom he had known since the

early 1820's. In a letter of January 16, 1826, about his plans for the project, Sparks advised Justice Washington "For further information as to my purposes and qualifications, permit me . . . to refer you to Judge Story, with whom I have conversed on this subject, and who manifests a lively interest in the plan of collecting into one body all the writings of General Washington".[11] On January 20, 1826, Justice Story wrote to Sparks:

> I think your project of collecting the works of Washington a noble project and deserving of universal encouragement. I know not into whose hands the task could better have fallen. Your letter to Judge Washington is excellent both in matter and manner, and develops your plan in such a way as cannot but command approbation.[12]

On January 26, 1826, Sparks wrote a second letter, this one to Justice Washington and Chief Justice Marshall, which Story delivered on Sparks' behalf.[13] On February 23, 1826, Justice Story reported to Sparks with regret that "Judge Washington does not incline to favor your project." [14]

When Washington remained unresponsive, Sparks again took up the matter with Justice Story, advising him of his determination to proceed anyway, explaining in a letter of March 4, 1826, that the publication might still be possible without Bushrod Washington's aid. "All the important materials may be obtained from other quarters, though

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[11] H.B. Adams, The Life and Writings of Jared Sparks, v. I, p. 401 (1893).

[12] *Id.*, pp. 401-02.

[13] See *id.*, pp. 404, 405.

[14] *Id.*, pp. 402-03.

with great trouble. Washington's public letters and papers are the property of the nation." [15] After assembling a massive number of these papers, largely from official files, Sparks again wrote to Justice Washington, threatening to publish without his aid, but promising a share of the profits if he were granted access to the documents in Justice Washington's possession.[16] Eventually Sparks was permitted to use these materials in return for an agreement that the resulting profits were to be divided evenly between Sparks, Justice Washington, and Chief Justice Marshall.[17]

Justice Story was substantially involved thereafter in the commercial aspects of the publication of President Washington's papers. On June 1, 1827 he wrote to Sparks of his support for the project and suggested another source of profit. "What do you mean to do as to England? You ought, if possible, to secure some of the profits of an edition there. On this subject we must talk . . . ." [18] Sparks' diary for March 6, 1827, notes that after meeting with Justice Washington to discuss their contract he

> passed half an hour with Judge Story. He has taken an ardent interest in this work from the beginning and has assisted me much in bringing the matter to its present issue. He advises by all means to make provision for a sale in England—thinks many will sell and that a vigorous effort should be made to extend the circulation there.[19]

[15] *Id.*, p. 404.

[16] *Id.*, p. 409.

[17] "Articles of Agreement, March 7, 1827", in Manuscript Collection of Morristown, New Jersey, National Historical Park.

[18] H.B. Adams, The Life and Writings of Jared Sparks, v. II, p. 265 (1893).

[19] *Id.*, p. 8. Sparks and Story discussed the editing of the papers on January 20, 1827. *Id.*, p. 3.

To promote advance orders for the forthcoming compilation, Justice Story and Sparks cooperated in a series of letters from Sparks to Justice Story which described the project and were used to obtain press coverage of the letters. The letters appeared in the summer of 1827 in the nation's leading newspapers, including the front page of the *National Intelligencer*,[20] owned by the Supreme Court printer, and caused Justice Story "unmixed satisfaction." [21]

Justice Story's relationship with Sparks and Folsom did not end with the publication of Washington's papers. In 1829 Story became a part-time professor of law at Harvard, where he continued his close friendship with Sparks, who also served on the faculty, and presumably remained in contact with Folsom, who was Harvard's printer.[22] Story, Sparks and Folsom still held these positions in 1841 when Justice Story decided *Folsom* v. *Marsh*. The decision in that case was based on a factual record developed by one George Hillard as Master in Chancery; Hillard was a paid contributor at the time to a series edited by Sparks, the *Library of American Biography*.[23]

Under these circumstances the Court should not attribute to *Folsom* v. *Marsh* the precedential significance that would

[20] The letters are set out in *id.*, pp. 236-264. After their publication Justice Washington wrote to Sparks "Your letters to Mr. Justice Story have excited but one sentiment everywhere so far as I can understand, and that, the most favorable to your undertaking." *Id.*, p. 266. The letters were later reprinted in a pamphlet which was used as a prospectus. *Id.*, p. 236.

[21] *Id.*, p. 265.

[22] See A. Johnson and D. Malone, Dictionary of American Biography, v. III, p. 493, v. IX, pp. 106, 431-33 (1930).

[23] G. Hillard, Captain John Smith (c. 1840). Hillard was a contributor to the North American Review edited by Sparks, as was Story. A. Johnson and D. Malone, Dictionary of American Biography, v. V, p. 50 (1930); H.B. Adams, Life and Works of Jared Sparks, v. I, p. 311 (1893).

be due the decision of a judge who, unlike Justice Story, was not an active instigator and proponent of the work whose copyright was challenged, was not a personal friend of all the parties in interest on one side, and did not have extensive personal knowledge of and participation in the events giving rise to publication.

Since the ownership asserted by appellant is not acquired in any of the manners, such as purchase or bequest, known to the common law, there seems no intelligible limit on what he owns or could acquire as President. Appellant asserts his property includes everything in the White House Office, regardless of what it is or how it got there,[24] and appears unwilling to accept ownership limited to documents he wrote, documents he signed, documents he read, documents he knew existed, documents prepared in the White House, or documents involving privileged material. Sustaining such an assertion would be an invitation to a President to direct that documents be transferred to the White House Office in order to convert them into his personal property. Even were the scope of ownership more restricted, a President could direct government employees to create documents and other materials for his personal use and ultimate removal from the White House. The former Special Prosecutor has suggested that the tapes in this case were made for just such personal gain by appellant.[25] Members of Congress have upon occasion copyrighted materials, or charged fees for giving speeches, written by congressional employees on office time.

The principle of ownership asserted by appellant is not limited to former Presidents. Appellant earlier claimed similar ownership of his Vice Presidential papers, and here

[24] Brief for Appellant, pp. 25-31.

[25] L. Jaworski, The Right and The Power, p. 272 (1976).

suggests officially prepared documents are also the personal property of congressmen and members of this Court.[26] Recently government documents have been removed for personal use, presumably under a similar claim, by White House aides and cabinet and sub-cabinet officials.[27] In earlier years similar assertions of ownership of officially prepared papers or their contents have been made, generally unsuccessfully, by a Vice-Admiral,[28] a Senator,[29] a court reporter of written decisions,[30] a sailor who traveled with Commodore Perry to Japan,[31] and an assistant to the Secretary of the Interior.[32] Recognition of such claims would seriously impair the completeness and integrity of government files, and would ultimately embroil the courts in disputes as to whether, for example, a memorandum is "owned" by the author, the intended recipient, other readers, the person or persons discussed, or any of the supervisors of these individuals.

The public interest requires that a former President or other departing officials not be free to remove at will files kept in or for their offices. The history of this intermittent practice reveals the extent to which it can impede the operations of the national government. Among the documents which thus disappeared with the outgoing officials,

[26] Report of the Joint Committee on Internal Revenue Taxation, Examination of President Nixon's Tax Returns for 1969-72, p. 1 (1974); Brief for Appellant, p. 92.

[27] Brief of Appellees The Reporters Committee for Freedom of the Press, p. 38, n. 30.

[28] *Public Affairs Associates* v. *Rickover*, 369 U.S. 111 (1962).

[29] *Pearson* v. *Dodd*, 410 F.2d 701, 708 (D.C. Cir.) *cert. denied* 395 U.S. 947 (1969).

[30] *Wheaton* v. *Peters*, 8 Peck. (33 U.S.) 591, 660 (1834).

[31] *Heine* v. *Appleton*, 11 F.Cas. 1031 (C.C.D.N.Y. 1857).

[32] *Sawyer* v. *Crowell*, 46 F.Supp. 471 (S.D.N.Y. 1942), aff'd 142 F.2d 497 (2d Cir. 1944).

and whose absence led to serious problems, were the official copy of the Treaty of Versailles,[33] the sole copy of a State Department cable regarding assurances to France during the 1956 Suez Crisis,[34] and the only copy of a memorandum from Secretary of State Dulles assuring the Israelis of aid if the Egyptians blockaded the straits of Tiran.[35] American officials only learned of the latter document when it was relied on by the Israeli Foreign Minister during negotiations with President Johnson on the eve of the 1967 Arab-Israeli war. Even where incumbent officials know documents exist, their predecessors are not always willing to supply them; thus appellant refused to permit examination of any relevant presidential papers by President Ford's Commission on CIA Activities within the United States.[36] These problems are inevitable because, once they leave office, the concerns of former Presidents and other former officials are not solely, or primarily, the effective conduct of government affairs by their successors, but foreseeably and not improperly include protecting their standing in history and advancing the political and financial interests of themselves and their party.

[33] R. Murray, "How Harding Saved The Versailles Treaty", American Heritage, pp. 66-67 (December, 1968).

[34] "Governing in the Dark", Washington Star, January 16, 1977.

[35] *Id.*

[36] Report of the Commission on CIA Activities Within the United States, p. 172 (1975).

II.

The Presidential Recordings and Materials Preservation Act Is Constitutional.

The government's ownership of the materials conveyed to the Administrator by the challenged statute is, we believe, dispositive of the other issues raised by appellant. Such ownership necessarily carries with it the right of officials of the executive branch to hold, examine, and use the government property in question, and appellant could have no privilege exercisable against the lawful owners of the disputed papers and tapes. To the extent that an incumbent President concludes that public disclosure of these or any other documents is consistent with or required in the national interest, his decision cannot be reviewed or countermanded by any of his predecessors. Appellant, having co-mingled his own property, personal and political, with that of the government cannot reasonably object if responsible government officials, at the behest of Congress, seek to examine the resulting admixture to extract what is public property. The Presidential Recordings and Materials Preservation Act does not single out appellant's property, alone among all Presidential papers, for expropriation; the property interest appellant asserts was neither his nor that of his predecessors or successors. To the extent that the Act guarantees appellant access to and copies of all the disputed papers it confers upon him legal rights which he did not previously enjoy.

That documents produced or received by officials in the executive or, for that matter, legislative or judicial branches, are not their personal property does not mean that the custody and secrecy of such materials cannot be controlled, or that public access must be granted prema-

turely. What is at issue is not whether access or use of such materials can be regulated, but who is empowered to regulate it. Since the papers are the property of the United States, they are and must remain under the control of authorized officials of the United States.

Absent a statutory limitation, an incumbent President could place some government documents in the temporary and revocable custody of appellant or any other private citizen, but in the instant case President Carter has not chosen to do so and Congress has prohibited such a transfer.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

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